Filed 6/23/09 Adoption of Hailey C. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Adoption of Hailey C., a Minor.	
CHRISTINE C., Plaintiff and Respondent, v. CASIE V., Defendant and Appellant.	G041026 (Super. Ct. No. AD76210) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Julian Cimbaluk, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Redmond P. McAneny for Plaintiff and Respondent.

Ludwig Law Center, Eric Ludwig; and Michelle Jarvis for Defendant and Appellant.

Casie V., the mother of now eight-year-old Hailey C., appeals the termination of her parental rights under Family Code section 7822 (section 7822), based on abandonment. She contends the court erred in finding she failed to support or communicate with the child for one year before the filing of the petition, the presumption of abandonment was rebutted, and the termination was not in the best interest of the child. The thrust of her primary argument is that the one-year period on failure to support or communicate specified in section 7822 must occur immediately preceding the filing of the petition. We disagree with each of the contentions and affirm the judgment.

The appellate record contains no document entitled "judgment." Rather, the notice of appeal appears to be from the court's September 17, 2008 minute order. But to avoid delay and in interests of justice we exercise our discretion to deem the order an appealable final judgment. (*Basinger v. Rogers & Wells* (1990) 220 Cal.App.3d 16, 20-21; *Avila v. Standard Oil Co.* (1985) 167 Cal.App.3d 441, 445.)

FACTS

Until Hailey C. was about four and a half years old, Casie was her primary caregiver. Thereafter, the child's father obtained custody due to Casie's drug use. Casie was granted visitation rights but these were soon terminated because of her failure to comply with an order to test for drugs. According to the child's father, Casie failed to provide evidence of drug tests, as a result of which, she did not see the child between August 2005 and April 2007. During this period she also failed to provide any support for the child. Respondent Christine C., the wife of the child's father, took care of the child.

In a declaration Casie stated that she visited the child on December 29, 2005 at the hospital where the child was having surgery.

Christine filed a request to adopt the child on December 18, 2006. Casie filed objections. Christine filed a petition to declare the child free from parental custody and control on June 27, 2007. Trial was conducted in September 2008. A report prepared by Jean Metcalf, court investigator, recommended the court grant the request for stepparent adoption. Dr. Amy Stark, a clinical psychologist with an expertise in child psychology, rendered a detailed report and testified at the trial. The court granted the petition and freed the child from the custody and control of Casie.

DISCUSION

1. Standards of Review

Casie's first argument raises a matter of statutory interpretation, a question of law, which we review *de novo*. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) As to the remainder of her arguments, we apply a substantial evidence standard of review of the trial court's findings. (*In re B.J.B.* (1986) 185 Cal.App.3d 1201, 1212.) We apply this standard keeping in mind that in a section 7822 proceeding all of the trial court's findings must be made by clear and convincing evidence. (Fam. Code, § 7821.)

2. The court properly concluded section 7822 applied.

Section 7822, as amended in 2007, authorizes termination of parental rights for abandoned children. Insofar as relevant here, subdivision (a) provides: "A proceeding . . . may be brought if any of the following occur: . . . [¶] . . . [¶] (3) One parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child." The relevant

portion of section 7822, subdivision (b) provides: "The failure to . . . provide support, or failure to communicate[,] is presumptive evidence of the intent to abandon. If the parent . . . [has] made only token efforts to support or communicate with the child, the court may declare the child abandoned by the parent . . . ." With respect to the issues here, the pre-2007 version of the statute was identical.

The trial court found that Casie had not made support payments or visited with the child for one year. Casie argues that the one-year period specified in section 7822 must be the year immediately preceding the filing of the petition. The evidence supports the conclusion that she did not visit or support the child between August 2005 and April 2007. The petition to declare minor free from parental custody and control was filed on June 27, 2007. So there were two or three months after the adoption request was filed but before the petition was filed during which Casie visited with the child and contributed to her support.

Casie's argument that, as long as the abandonment ceases for even a few months before the petition is filed, has no support in any authorities nor does the language of the statute permit us to insert such a limitation. As noted the statute operates when a "parent has left the child in the care and custody of the other parent for a period of one year without any provision for the child's support, or without communication from the parent." Casie wants us to insert the phrase "immediately preceding the filing of a petition" after "one year." But if this were the intent of the legislature, it could easily have written the statue in this manner. We find over 1000 uses of the phrase "immediately preceding" when searching California statutes. To name a few: Business and Professions Code section 1635.5, subdivision (a)(3), Civil Code section 1748.7, subdivision (h)(1), Code of Civil Procedure section 116.940, subdivision (c), and Corporations Code section 29530, subdivision (a)(6).

In support of her argument, Casie refers to proposals by the Orange County Bar Association, the Family Law Section of the State Bar of California, and the 2007

Conference of Delegates seeking to amend the statute to require the abandonment be during the year immediately preceding the filing of the petition. But the very fact that such proposals may have been made illustrates that the statute does not contain such a limitation. And Casie's policy arguments in favor of such a change must be disregarded as it is not within our power to alter a clear and unambiguous statute even were we to agree with those arguments. "'In reading statutes, we are mindful that words are to be given their plain and commonsense meaning. [Citations.]' [Citation.]" When construing a statute, a court "'must be careful not to rewrite an unambiguous statute by inserting qualifying language. [Citations.]'" (*Sabatasso v. Superior Court* (2008) 167 Cal.App.4th 791, 797-798.)

And as Christine points out in her brief, *Adoption of Burton* (1956) 147 Cal.App.2d 125, 131, decided under a predecessor statute, rejected an interpretation similar to the one Casie imposes on section 7822. *In re Connie M.* (1986) 176 Cal.App.3d 1225, 1237, also decided under the predecessor statute, is to the same effect. Although we recognize that these cases may be distinguished both factually and on the basis of differing statutory language, they nevertheless support the proposition that, in the absence of specific statutory language, the court is not at liberty to insert an "immediately preceding" requirement into the statute.

3. Substantial evidence supports the court's finding that the presumption of abandonment was not rebutted.

Section 7822, subdivision (b) states in part that "[t]he failure to . . . provide support, or failure to communicate[,] is presumptive evidence of the intent to abandon." Under the statute, intent to abandon applies to the one-year period rather than requiring an intent to abandon the child permanently. "The word 'abandon' must be construed in context with the language of the statute as a whole to give significance to every portion thereof. [Citation.] As pertinent to this case, [former] section 232 authorizes the

termination of parental rights when a child has been left by one parent in the care and custody of the other parent for a period of one year without communication and with the intent to abandon the child. By using the general term 'abandon' ('intent on the part of the parent . . . to abandon the child') in conjunction with a specific period of time (one year during which the parent failed to communicate with the child), it appears the Legislature meant that an intent to abandon the child *during that period of time*, rather than an intent to abandon the child permanently, is sufficient to satisfy the statute. [Citations.]" (*In re Daniel M.* (1993) 16 Cal.App.4th 878, 883.)

Casie relies on evidence of her attempts to visit the child. But the reason she was unable to visit was that the court required her to produce evidence of negative drug tests. And her failure to obtain such evidence belies her argument. The only evidence of a negative drug test contained in the record is dated April 28, 2007. Casie's attempt to defraud the court by trying to have another person take a drug test in her name hardly qualifies as a good faith effort to comply with the court order. And even when the drug program was ordered in May 2006, Casie did not enroll until half a year later. These failures to comply with the conditions imposed upon visitation contradict Casie's insistence that she did not intend to abandon the child and supply substantial evidence to support the trial court's conclusions. Casie notes that *In re B.J.B., supra,* 185 Cal.App.3d at p. 1212, stated that the trial court may consider "the genuineness of the effort [to visit the child] under all the circumstances . . . ." But Casie's failure to adequately attempt to meet the conditions that would have permitted her to visit the child defeats her claim that these efforts to visit were genuine. And she makes no argument in this appeal justifying her failure to support the child, which, by itself, qualifies as abandonment.

4. Substantial evidence supports a finding that the stepparent adoption was in the child's best interest.

Dr. Amy Stark submitted an 80-page report and was cross-examined by Casie's lawyer. Obviously the information contained in the report is extensive. We will note only some of the relevant information provided by Stark to demonstrate that there was substantial evidence to support the trial court's determination that the termination of Casie's parental rights and the stepparent adoption were in the child's best interest.

Various tests performed by Stark on Casie led her to conclude that (1) Casie "is blaming her current circumstances on everyone else around her and less on her, not on the fact that her actions caused these problems," (2) she "has a great deal of difficulty letting go, forgiving and forgetting. She has a tendency to blame everybody else instead of looking at herself squarely, take responsibility and mov[ing] on," (3) "she may have a tendency to put her own needs ahead of her child's," (4) she has "continued difficulties with chemical dependency," and (5) "long[-]standing psychological difficulties that have led her to act out, use drugs, and not perhaps be the best parent."

Casie had three children by three different men over a six year period. Her second child was born drug addicted and his father has custody of him. She also used methamphetamine while pregnant with her third child. After observing Casie and the child together, Stark noted that the child "does not treat Casie . . . as her mom but looks at her more as a playmate and Casie plays with her at that level. I do not see a lot of structure, guidance, or direction."

As to the child's attitude, Stark reported "I asked [her] if she would like to spend more time with her mom Casie and how she felt about that. [The child] said she wants less time. She would be sad if she couldn't see Casie anymore but she doesn't want to be over there as much as she [is] because she just doesn't feel comfortable."

This is not to disregard positive information concerning Casie and her relationship with the child. But the issue is whether substantial evidence supports the

court's decision, not whether we would weigh the evidence in the same manner. And the forgoing, very abbreviated content of Stark's report, satisfies the substantial evidence requirement.

5. The remaining attacks on the trial court ruling do not substantiate reversal.

Casie charges the trial court with a number of other errors. The brevity and nature of these attacks demonstrate that we can deal with them in the same summary fashion.

Casie points to a single statement by the trial court, which she claims indicates the court thought she was correct in her argument concerning the requirement that the one-year period under section 7822 take place "immediately preceding" the filing of the petition. If anything, this appears to be an innocent misstatement and does not go to the merit of the court's decision.

Casie next argues that court considered "best interest of the child" before considering the abandonment issue. The quoted statements appear to reflect the court's understanding that, even if there was abandonment, it would still have to decide what was in the child's best interest.

The court stated that Casie "rehabilitated herself after the petition had been filed in this case." Casie characterizes this as a misstatement of fact. Obviously the court was referring to the initial petition filed in these proceedings, the "Adoption Request," not the "Petition to Declare Minor Free from Parental Custody and Control."

Finally, Casie takes issue with the court adopting Stark's recommendation that, even where parental rights were terminated, the child should be permitted to have continuing contact with Casie. The court recognized it did not have the power to order continued visitation. But the court making such a common sense and sensitive suggestion in no way demonstrates a misunderstanding of the law.

DISPOSITION

The judgment is affirmed. In the interest of justice, the parties shall bear their own respective costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.